Supreme Court, U.S.
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No. 93-617

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIE J. DUNN,

Petitioner

versus

WILMA D. SIMS,

Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court Of Alabama

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Reply To Respondent's Brief

Comes now petitioner pursuant to Rule 15.6, Rules of The Supreme Court and replies to respondent's brief in opposition and admits, denies, avers, and alleges as follows:

Reply To Argument
I

Denies. Avers that the record is very clear on these violations. While we do not wish to recite the complete record, we do however, feel that it is prudent to call this Court's attention to relevant facts: (1) the trial court heard respondent's motion and entered an order on the same day (R-279; R-285); (2) the trial court refused to hear seven of petitioner's motions (R-309); (3) the trial court prejudiced petitioner beyond recovery when it allowed three different attorneys to come before it and represent defendant (R-304-9); (4) respondent failed to give notice that it would adduce oral testimony from petitioner's former attorney (R-445); and (5) petitioner did not have an opportunity to offer rebuttal testimony to wit:

> [The] plaintiff should have been given notice that testimony was to have been taken upon oral argument. Too, plaintiff should have been told that defendant had planned to adduce testimony from a witness...
>
> Indeed, the Honorable Judge Sullivan's testimony should have been offered in rebuttal.
>
> Plaintiff's Objection To The Court's Order Entered On August 13, 1991, (R-453)

Avers that his due process rights were violated because he was not given proper notice, to wit:

> Q ...had I known this was going to be a full blown trial I would have prepared for it. (CRT[1], R-29)
>
> Q Your honor, just bear with me for a minute...if I had known this was going to be a trial I would have had this ready. (CRT, R-34)

This Court dealt with a similar situation in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and held that at a minimum, due process required that before a litigant could be deprived of his property he must be given notice and an opportunity for a

1. "CRT" references Court Reporter's Transcript.

hearing. We admit that we were given notice; however our contention is that the notice did not apprise us of the defendant's intent to call for a witness, petitioner's former attorney such that he (petitioner) could offer rebuttal testimony. Similarly, in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, this Court held that the "Fourteenth Amendment requires an opportunity...granted at a meaningful time and in a meaning manner...for [a] hearing appropriate to the nature of the cause." Our contention therefore, is that the notice was not to the nature of the cause. Alleges that respondent knew and the trial court too that petitioner's former attorney had been subpoenaed as a court reporter was set-up to take testimony. Never before had that been done. Clearly petitioner was denied his right to offer rebuttal testimony.

It is generally understood that procedural due process, as guaranteed by the Fourteenth Amendment, requires fair play, which includes proper notice and an opportunity to present opposing

party to controvert testimony. 16A, Am.Jur.2d, Constitutional Law, §839(1979).

Avers further that the Due Process Clause guarantees against unjustified feelings of unjust treatment. Petitioner was made to feel that he was unjustly treated when the trial court told he to "Get yourself a lawyer." Petitioner had a statutiorial right to try his own case. Being as he was the only Black in the courtroom and such comments caused the all whites to bust into laughter. Clearly prejudicial and merits the granting of the writ on the ground that petitioner could not and did not get a fair trial. In Re Murchison, 75 S. Ct. 623, this Court reversed when the fact showed that Murchison did not get a fair trial before a fair tribunal. Petitioner here contents that he too did not get a fair trial and that he did not have a fair tribunal (See R-300, Petition for Writ of Manadmus).

Admits. Avers that the trial court denied petitioner procedural due process rights, to wit: when respondent motioned to enforce the settlement

agreement, petitioner had an application for a writ of manadamus before the Supreme Court of Alabama. The writ sought an order to remove the trial judge on the ground that he had abused his discretion and that petitioner could not get a fair trial. The petition was denied on May 31, 1991. Petitioner had 14 days, including June 14, 1991, to petition for a rehearing. The trial court issued its "Notice" on the hearing of the motion on June 13, 1991. Petitioner filed his petition for rehearing on June 14, 1991, in accordance with Rule 21(e)(1-3), Alabama Rules of Appellate Procedure ("ARAP"). Clearly denial of procedural due process (R-453; R-455).

Admits. Avers that petitioner's argument was that under Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App.. 1978) the settlement agreement did not meet the requirements of the law (CTR, R-49). First, the settlement agreement was not entered on the record, to wit:

Attorney Ralph Gaines, III

Q As stated earlier I do not see

an entry of the settlement agreement entered into by you on May 25, 1990.

Q So, you don't see one. Does that mean there is one or is not one?

A That means for the months of March through June of 1990, I didn't see one on the docket.

Secondly, there was no record of it on the case action summary sheet, to wit:

The Honorable William Sullivan

A Was there any notation at all?

The Court: No notation.

Thirdly, the trial court did not enter an order dismissing the case, to wit:

A Was any order entered on this particular one ?

The Court: No, there wasn't.

Admits. Petitioner's contention is that respondent failed to give he notice that his former attorney had been subpoenaed (R-445); that arrangements had been made to have a court reporter present to record oral testimony; and that oral testimony would in fact be adduced from a witness. In other words, due process is "any proceeding...authorized

by law and sanctioned by usage. Any proceeding which supercedes or displaces the aforesaid can not be regarded as due process of law." Clearly petitioner was deprived of his "property interest" because he was not given proper notice. This Court has granted a writ when an order would result in the deprivation of such important constitutional protected rights such as the ones in this case. For example, in Mullane, supra, at 313, 70 S.Ct. at 656, this Court granted a writ under similar circumstances.

Petitioner's contention is not that he did not have his day in court; quite the contrary. His contention is that neither the trial court or the appellate courts addressed his claims of denial, abridgement and/or violation of procedural, statutorial and constitutional guaranteed due process rights. That whatever the trial court did, it had to do it in accordance with due process of law. Clearly it didn't. We urge this Court to review the facts to determine the extent to which petitioner's constitutional rights were

abridged.

Admits. Avers that respondent's theory of recovery was pursuant to Rule 47, ARAP, to wit:

> Rule 47 of the Alabama Rules of Appellate Procedure is depositive of the issue concerning the enforcement of an agreement reached between the parties.
>
> Brief Of Appellee, Wilma D. Sims, p. 11

Admits. Avers that the Supreme Court of Alabama never considered the issue of whether petitioner's rejection of the settlement agreement and the trial court's continuance of it, in juxaposition with respondent's failure to file an objection or an affirmative defense under Rule 12(g) ARCP, estopple the case and thus assert his right to enforce the settlement agreement. Failure to do so rendered it null and void and unenforceable. Avers further that the court rendered an opinion which mirrowed the argument of amicus curiae to the extent that Rule 1, ARAP placed limitations on the applicability of Rule 47, ARAP; an issue which respondent never raised nor preserved at the trial court level. The writ should be granted

to determine whether an appellate court may decide a case on an issue not properly preserved in the court below. There can be no doubt of the right of a reviewing court to reverse upon an issue not raised at the trial court level to prevent a plain miscarriage of justice." Hilvering v. Rubinstein, 124 F.2d 969, 972 (8th Cir.) Admits. Denies that petitioner makes the same argument here that he made at the Supreme Court of Alabama. Denies. Denies. and denies.

XI

Denies. Avers that the court's opinion rested on an issue that was only raised by amicus curiae. Petitioner contents that the court erred on the ground that a settlement agreement didn't exist, to wit: Judge Sullivan, the trial judge, by virtue of the judicial power[2] vested in he by statute, accepted petitioner's rejection of the settlement agreement by his continance of the case. Respondent accepted the terms and conditions of the continuance by his actions: she failed to object and to file a Rule 12(g) ARCP motion to

estopple it. Respondent simply acquiesced. (See 4 C.J.S., Appeal & Error, §212, Acceptance of Terms and Conditions). Avers further that neither the Supreme Court nor the trial court considered the issue of denial, abridgement and/or violation of petitioner's constitutional rights under the Fourteenth Amendment. The writ should be granted to determine that petitioner's reliance upon Judge Sullivan's judicial power[2] was not misplaced. Equally, the writ should be granted to determine whether the Supreme Court of Alabama erreonously applied the law under Spurlock, supra, vis-a-vis a statute diluted constitutional guaranteed rights.

Admits. Denies and denies, admits, admits and admits and admits. Avers that petitioner's contention is that respondent waiver any right to enforcement as per our argument herein. Admits and denies and admits. Avers that the dispute is

1. Judicial power means the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Cases in Constitutional Law, p. 31.

whether a settlement agreement existed. Avers that the trial court's opinion was pursuant to Rule 47, ARAP, (CRT,R-5), and that the Supreme Court's was the cincture of the argument of amicus curiae. Denies and denies. Avers that Spurlock, supra, did not present similar issues. Admits. Admits and admits and admits and admits. Avers that the Supreme Court of Alabama erred for the reasons cited herein. Denies. Avers that the facts of a case would determine this. Denies and denies.

Reply To Summary Of Reasons For Denying The Writ

Denies. Avers that the petition should be granted because of the importance of this case. Its importance lies in the deprivation of significant constitutional guarantees, namely the denial, abridgement, and/or violation of Fourteenth Amendment rights under the Due Process and Equal Protection Clause. Denies and denies. Avers that neither the trial court or the appellate courts were cloth with constitutional federal grant of authority to address petitioner's claims arising under the U.S. Constitution. Denies and avers that

the opinion of the Supreme Court of Alabama was based on an issue first raised on appeals. This Court as a general rule has revered appellant courts in deciding issues first raised on appeals. Denies and avers that a valid settlement agreement did not exist. Admits and avers that the Spurlock, supra, court found that the respondent waited for over a year before attempting to enforce the settlement agreement. Denies and avers that whether Judge Dement found that Section 34-3-21, Code of Alabama(1975) controls the making of a settlement agreement is not at issue in this case. We submit that what is at issue in this case is whether the petitioner's constitutional rights were denied, violated and/or abridged. Obviously, respondent's argument is without merit on the ground that the argument fails to address the importance of these constitutional guarantees. Admits and admits. Avers that the Supreme Court of Alabama erred in applying Spurlock, supra, to the facts of this case.

Reply To Questions Presented

Denies. Avers that the question to be decided by this Court is whether the Due Process and Equal Protection Clause of the Fourteenth Amendment vindicate the denial, abridgement and/or violation of constitutional rights.

Reply To Opinion Below

Admits. Avers that for this Court to glean the full flavor of the importance of this case, the Alabama Rules of Civil Procedure, specially Rule 5, Rule 12(g) and Rule 78; the Alabama Canons of Judicial Ethics(1975), Canon 3(C)(1)(a); the Alabama Rules of Appellate Procedure, Rule 47; and the Constitution of the State of Alabama(1901), Article I, Section 6, should be reviewed in tandem with the opinions relevant to the facts and specific constitutional guarantees this case presents. Admits. Admits and admits. Admits.

Admits.

Reply To Statement of Jurisdiction

Admits. Admits. Admits. Admits. Avers that this Court's jurisdiction was invoked at the trial court level and thus this Court has grant of juris-

diction.

Reply To Respondent's Statement Of The Case

Denies and admits and admits. Admits. Admits and admits. Avers that petitioner's objection preserved this issue for review (R-343; R-436; R-439; R-453). Admits, denies and admits as well as admits. Denies. Avers that the opinion rested on an issue first raised on appeals by amicus curiae. Admits and admits. Admits and denies. Avers that petitioner's application for rehearing was pursuant to Rule 39(k), ARAP, requesting the court to correct material facts and to delete its erronous conclusion. Admits and admits and admits.

Denies and admits, denies. Denies and denies.

Reply To Underlying Facts

Admits. Admits and admits and admits. Admits and admits. Admits. Denies, denies and admits. Admits and admits, denies. Avers that in as much as respondent has not denied relevant facts presented by petitioner-upon which this case rests-this Court may accept them at fact value. Alleges therefore that respondent has intentionally

withheld relevant and material facts of this case. Facts which would have shown the extent to which petitioner's constitutional rights were abridged; e.g., respondent knew that the trial court granted their motion on the same day it was made and entered an order therewith. Petitioner urges this Court to review the facts as found in the record.

Reply To The Procedural History Of The Case

Admits. Avers that the motion was made pursuant to Rule 47, ARAP and Section 34-3-21, Code of Alabama(1975). Avers petitioner filed objections (R-343; R-436) which preserved the issue for review. Admits. Avers that respondent failed to give petitioner proper notice (R-453) causing he to be totally and completely surprised (R-453 at n. 1), admits, admits, and admits and admits. Denies. Avers that the court found that no such was on the record (CRT,R-66) and denies. Admits. Avers petitioner filed an objection to its enforcement (R-453) and admits. Admits proceeds were paid to the trial court. Denies proceeds were paid to petitioner.

Admits and admits. Avers that the trial court did not hear all such motion (R-457). Avers that petitioner filed objection (R-436/439; R-446; R-453). Denies. Avers that the notice was to the Alabama Supreme Court. Admits. Admits. Admits and denies. Avers that the court's opinion rested on an issue not properly preserved in the court below and one which was raised by amicus curiae on appeals. Admits and admits. Admits. Admits, admits and admits.

Demies. Admits and admits and admits. Denies and admits.

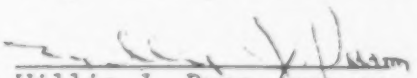
Reply To Conclusion

Denies. Denies. Denies and denies and denies, denies, denies. Admits. Avers that petitioner was deprived of his property interst because his due process and equal protection rights were denied by the Supreme Court of Alabama. Denies. Avers that petitioner entered into the agreement under duress. Denies. Petitioner had a right to reject a settlement agreement which was unjust, unfair and which did not pay he for his pain and

suffering or which did not cover his out-of-pocket expenses. Denies that any such agreement existed. Denies.

Petitioner invoked the protection of the Fourteenth Amendment at an early stage of these proceedings. The question of denial, abridgement and/or violation of constitutional guaranteed rights is a question of federal law and is to be determined by this Court. This Court has granted a writ in cases similar in importance.

Respectfully submitted,



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